ZAINAL ABIDIN BIN JAWI v. MAT HASSAN ABDUL & ANOR.

[O.C.J. (Lim Beng Choon J.) October 31, 1987]

[Alor Setar – Civil Suit No. 477 of 1983]

Civil Procedure – Summary judgment sought – Sale of land – Failure to complete sale – Plea of non est factum – R.H.C. 1980, O. 81 r. 1.

Land Law – Sale of Land – Failure to complete sale – Plea of non est factum.

In this action, the first defendant allegedly empowered the second defendant with a power of attorney to deal with a certain piece of land. By an agreement made between the plaintiff and the second defendant, the second defendant agreed to sell the land to the plaintiff. The plaintiff paid part of the purchase price. Thereafter, attempts were made to complete the transaction but these attempts failed. The plaintiff also found out subsequently that the land was sold to a third party.

The plaintiff applied by way of summary judgment for, *inter alia,* specific performance of the agreement and damages. The second defendant did not defend the action. The first defendant pleaded *non est factum.*

Held: the first defendant had failed to show this court that there was any triable issue in his purported defence.

Cases referred to:

(1) *Bank Bumiputra Bhd.* v. *Majlis Amanah Rakyat* [1979] 1 M.L.J. 23.
(2) *Tong Lee Hua* v. *Yong Kah Chin* [1981] 2 M.L.J. 1.
(3) *Burns* v. *Kondel* [1971] 1 Lloyds Rep. 554.
(4) *Wallingford* v. *Mutual Society* (1880) 5 App. Cas. 685.
(5) *Gallie* v. *Lee* [1971] A.C. 1004, 1015.

CIVIL SUIT.

Tan Beng Hong for the plaintiff.
Ong Gim Sem for the first defendant.

Cur. Adv. Vult.

Lim Beng Choon J.: In this ruling, I propose to deal only with the application of the plaintiff for summary judgment on the ground that the defendants have no defence on the merits of the case. I do not propose to deal with the interlocutory proceedings instituted by the defendants for leave to file a statement of defence out of time as the matter has been compromised.

Should there be an appeal with leave of this court, I shall deal with all the relevant matters in my written judgment.

This is an application made by the plaintiff by way of summons-in-chambers filed on February 24, 1986 (see enclosure 29) for summary judgment on the ground that the defendants have no defence to the action commenced by writ by the plaintiff. The application is made pursuant to Order 81 rule 1 of the Rules of the High Court.

The facts leading to the action out of which this application was made can be briefly stated as follows. The first defendant was said to have empowered the second defendant with a power of attorney to deal with the piece of land held under Surat Putus Kechik (SPK) No. 9311 Lot. No. 2965 Mukim Telui Kiri, District of Kuala Muda Kedah, comprising 4 relongs 395 jembas (referred to as "the land") of which the plaintiff was the registered owner. The powers conferred on the donee includes the power to sell and to execute any conveyance instrument to effect the sale of the land. I may mention that at the hearing of this application, with the consent of both counsel, the power of attorney was tendered as the plaintiff's exhibit and marked "P1". By a surat perjanjian dated September 14, 1981, made between the plaintiff and the second defendant (see exhibit "ZA-2") annexed to the affidavit affirmed by Zainal Abidin b. Jawi on January 28, 1986, the latter, as the attorney of the first defendant, agreed to sell to the plaintiff the land at a purchase price of $10,034.15. Upon signing the surat perjanjian ("the agreement"), the plaintiff paid over to the second defendant a sum of $5,000 as part payment of the purchase price in compliance with clause 2 of the agreement. Under clause 2 of the agreement, the plaintiff was required to pay the balance of the purchase price of $5,034.15 to Bank Pertanian to whom the land was charged. It was further agreed that the plaintiff could make the payment to Bank Pertanian at any time and upon payment of the sum to Bank Pertanian to clear the loan owed by the first defendant to Bank Pertanian, the first defendant would take steps to transfer the land to the plaintiff. It was agreed between the plaintiff and the attorney of the first defendant to finalize the sale and purchase of the land at the office of Bank Pertanian Alor Star at 10.00 a.m. on October 4, 1981, but the attorney of the first defendant failed to keep the appointment. Repeated attempts were made to get the attorney to complete the sale and purchase agreement but without success. Finally on October 19, 1981 the plaintiff through his solicitors sent a notice of action by A.R. post to the second defendant requiring him to complete the transaction at the office of the plaintiff's solicitors in Penang within seven days effective from the date of the said notice. In the notice, it was

also mentioned that the plaintiff was prepared to pay off the sum owing to Bank Pertanian and a copy of the notice was sent to the said bank. The said notice brought no response. The plaintiff then wrote to the first defendant on February 24, 1982 and July 15, 1982 requesting him to complete the transaction but likewise, the first defendant failed to respond to the plaintiff's request. The plaintiff subsequently found out that the first defendant had sold the land to one Boo Hock Soon @ Boo Choo Soon at a total purchase price of $18,000. In the result, the plaintiff instituted this action praying for an order of specific performance of the agreement, damages for breach of contract in lieu or in addition to specific performance and costs.

The second defendant, the attorney of the first attendant, has failed to enter an appearance and it is clear from his inaction that he was not prepared to defend the action.

In his statement of defence, the first defendant relies only on one plea to support his contention that he has a reasonable defence upon the merits and that is the plea of *"non est factum"*. However, he admitted that the land was initially charged to Bank Pertanian and as he had defaulted payments to the Bank, a notice of demand of payments was issued by the Bank to him. He therefore approached the second defendant to help him to raise a loan of $5,000 to settle the outstanding payments due to the Bank. Whereupon the second defendant agreed and asked him to sign some papers which he did. He further averred that the said papers were signed in the second defendant's house and that he had no knowledge that the said papers related to a power of attorney empowering the second defendant to sell the land. He then went on to assert that the second defendant obtained his signature on the said papers by misrepresentation but he gave no particulars as to the nature of the misrepresentations made by the second defendant. He, however, does admit that he sold the land to Boo Hock Soon on January 19, 1983 for the sum of $18,000. However, there is one important admission made by the first defendant. In his affidavit affirmed on February 26, 1985 (see enclosure 14), in support of his application for leave to file his defence out of time, he asserted in paragraph 6(g) thereof that, and I quote:

"In consideration of the second defendant raising the loan to settle the loan to the Bank *I agreed to sell the land and upon the sale thereof I will pay him a reasonable amount for his services.*"

This assertion was not repeated in his statement of defence. However that may be, as the said affidavit forms part of the case papers, this court can take into consideration this sworn assertion made by the first defendant in his affidavit. In this connection, reference may be made to p. 140 of the *English Supreme Court Practice* 1979 Vol. 1 sub para 14/3-4/5 where it is stated:

"In deciding whether the defence set up is a real defence or not, all the circumstances must be looked at (per Bowen L.J. in *Blaiber* v. *Abrams* 77 L.T.J. 255 C.A. and see *Nassan Press* v. *Taylor* 70 L.T. 376)."

Unfortunately, the *Law Times Journal* and *Law Times* series are not available in this court. Be that as it may, I do not think that this court is precluded from considering the said sworn assertion of the first defendant. What weight should be placed on that assertion is a different matter.

It is common place that an application for summary judgment, whether under Order 14(1) or Order 81(1) of the Rules of the High Court, can be successfully resisted by a defendant if he can raise a *bona fide* triable issue, *i.e.* a defence on the merits – see *Bank Bumiputra Bhd.* v. *Majlis Amanah Rakyat*[1], *Tong Lee Hua* v. *Yong Kah Chin*[2], *Burns* v. *Kondel*[3] and *Wallingford* v. *Mutual Society*[4].

As regards the plea of *non est factum*, some instructive observations can be found in *Gallie* v. *Lee*[5] where Lord Reid said:

"The plea of *non est factum* obviously applies when the person sought to be held liable did not in fact sign the document. But at least since the sixteen century it has also been held to apply in certain cases so as to enable a person who in fact signed a document to say that it is not his deed. Obviously any such extension must be kept within narrow limits if it is not to shake the confidence of those who habitually and rightly rely on signatures when there is no obvious reason to doubt their validity. Originally this extension appears to have been made in favour of those who were unable to read owing to blindness or illiteracy and who therefore had to trust someone to tell them what they were signing. I think it must also apply in favour of those who are permanently or temporarily unable through no fault of their own to have without explanation any real understanding of the purport of a particular document, whether that be from defective education, illness or innate incapacity.

But that does not excuse them from taking such precautions as they reasonably can. The matter generally arises where an innocent third party has relied on a signed document in ignorance of the circumstances in which it was signed, and where he will suffer loss if the maker of the document is allowed to have it declared a nullity. So there must be a heavy burden of proof on the person who seeks

to invoke this remedy. He must prove all the circumstances necessary to justify its being granted to him, and that necessarily involves his proving that he took all reasonable precautions in the circumstances. I do not say that the remedy can never be available to a man of full capacity. But that could only be in very exceptional circumstances: certainly not where his reason for not scrutinizing the document before signing it was that he was too busy or too lazy. *In general I do not think he can be heard to say that he signed in reliance on someone he trusted.* But, particularly when he was led to believe that the document which he signed was not one which affected his legal rights, there may be cases where this plea can properly be applied in favour of a man of full capacity.

The plea cannot be available to anyone who was content to sign without taking the trouble to try to find out at least the general effect of the document. Many people do frequently sign documents put before them for signature by their solicitor or other trusted advisers without making any inquiry as to their purpose or effect. But the essence of the plea of *non est factum* is that the person signing believed that the document he signed had one character or one effect whereas in fact its character or effect was quite different. He could not have such a belief unless he had taken steps or been given information which give him some grounds for his belief. The amount of information he must have and the sufficiency of the particularity of his belief must depend on the circumstances of each case.

Further, the plea cannot be available to a person whose mistake was really a mistake as to the legal effect of the document, whether that was his own mistake or that of his adviser. That has always been the law and in this branch of the law at least I see no reason for any change."
(Italics is mine)

To my mind, the excuses of the first defendant in support of his plea of *non est factum* are not dissimilar to the examples given in Lord Reid's speech. At any rate, it is highly improbable that the first defendant did not know that the paper that he signed was an instrument in the nature of a power of attorney. It was signed, sealed and delivered in the presence of one Othman b. Ismail, Commissioner of Oaths of the High Court at Alor Star. Furthermore, the said Othman b. Ismail endorsed at the back of the power of attorney a certification which declared, *inter alia,* that the first defendant had acknowledged to him that "he is of full age and that he has voluntarily executed this instrument". In the circumstances, the first defendant's averments that (a) the said papers were signed in the second defendant's house at night and (b) the first defendant's signature was obtained by the second defendant on the second defendant's misrepresentation cannot be true. Furthermore, if the first defendant really did not know that he had signed a power of attorney and had no intention of giving the power of attorney to the second defendant, it is highly inconceivable that he would not have informed the plaintiff when the latter wrote to him on February 24, 1982 about the refusal on the part of the second defendant to finalize the sale agreement. The plaintiff wrote to him twice and in the second letter dated July 15, 1982, he had reminded the first defendant about his participation in encouraging the plaintiff to sign the agreement and to pay over the sum of $5,000. It also reiterated the promise made by the first defendant to see that the sale transaction would be completed by mid-July 1982 (see exhibit "ZA5" attached to the affidavit of the plaintiff dated January 28, 1986). If the first defendant is really innocent and has no knowledge whatsoever of the power of attorney, his failure to respond at all to that letter is highly inconsistent with his claim.

For the above reason, I am satisfied that the first defendant has failed to show this court that there is any triable issue in his purported defence.

Order accordingly.

Solicitors: *Tan Seng Hong & Co.; Syarikat Lim Kiam Hoon.*

HASHIM BIN DIN v. SATO KOGYO CO. LTD.

[O.C.J. (Lim Beng Choon J.) September 8, 1987]

[Alor Setar – Civil Suit No. 22-28-86]

Civil Procedure – Writ and statement of claim – Striking out – Application for – Principles applicable – Prayer for special damages – Whether can be allowed – R.H.C. 1980, O. 18 r. 19.

In his statement of claim, the plaintiff alleged that the defendants had trespassed onto two parcels of land of which the plaintiff was the registered owner. It was further contended that the defendants had entered into the said land without the permission and consent of the plaintiff for the purpose of removing red earth therefrom and in so doing the defendants had also caused damage to the said land when in the course of their excavating the same they had created trenches and pot holes.

By their present application, the defendants sought to strike out the statement of claim and the writ. The grounds for their application were: (i) there was no reasonable cause of action; (ii) the action was frivolous and vexatious.

Held: (1) it is trite law that the summary power under Order 18 rule 19 to strike out a writ or a statement of claim